IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1901.

VICKSBURG WATER WORKS COMPANY,
Appellant,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
Appellees.
No. 392.

STATEMENT OF THE CASE.

This appeal is taken by the Vicksburg Water Works Company from a decree dismissing its bill in equity, against the appellee for want of jurisdiction. This bill seeks relief against an act of the Legislature of Mississippi, certain resolutions and proceedings of the City Council of Vicksburg, Mississippi, and an election held in pursuance of said act of the Legislature. All of which are in said bill alleged to impair the obligations of a contract between the City of Vicksburg and the said water works company, and to cast a cloud upon the title of the latter.

In 1886, the City of Vicksburg, organized under its charter granted to it in 1884, secured the passage of an act by the Legislature of Mississippi authorizing said city "To provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to contract with a party or parties, who shall build and operate water works." (See Section 5, page 695, of the Acts of 1886, approved March 18th, 1886.)

On the 18th day of November, 1886, said city passed an ordinance contracting with Samuel R. Bullock & Company, their associates, successors and assigns. Parts of said contract which are involved in this controversy are as follows:

"An ordinance to provide for a supply of water to the City of Vicksburg, in Warren County, Mississippi, and to its inhabitants, contracting with Samuel R. Bullock & Company, their associates, successors and assigns, for a supply of water for public use, and giving the City of Vicksburg an option to purchase the said works."

Be it ordained by the Mayor and Aldermen of the City of Vicksburg:

SECTION I. "That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for a period of thirty (30) years, from the time that this ordinance takes effect, to Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the cor-

porate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus, for conducting and furnishing an adequate supply of good, wholesome water, to the City of Vicksburg, Mississippi, and to its inhabitants for public and private use, and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force."

SECTION III. "In consideration of the public benefit and the protection to property, resulting from the construction of said system of water works, the Mayor and Aldermen of the City of Vicksburg hereby rents of the said Samuel R. Bullock & Company, their associates, successors and assigns, not less than eighty (80) double nozzle, frost proof, fire hydrants, for the aforesaid period of thirty (30) years, at the annual rate of sixty-five ($65.00) dollars for each hydrant, to be payable semi-annually on the 15th days of January and July."

"After the first year of the operation of said water works, the said city hereby rents not less than ten (10) hydrants, in addition to said eighty (80), for the unexpired period of said thirty years; the first one hundred (100) hydrants shall be located on the original twelve (12) miles of mains, at said annual rental of sixty-five ($65.00) dollars, payable as aforesaid, and for the remainder of said period of thirty years, unexpired at the time of placing each of said hydrants."

"The rental of all hydrants in excess of one hundred (100) hydrants hereafter erected, on the line of distributing mains, or on the extensions thereof, as hereinafter provided, at the request of the said Mayor and Aldermen of the City of Vicksburg, shall be at the annual rate of fifty dollars ($50.00), for each hydrant, payable as aforesaid, during the unexpired period of the said original term of thirty (30) years."

"Water shall be used from said hydrants for the extinguishment of fires, and necessary fire practice, and for flushing sewers, and gutters, only provided that for fire practice and flushing sewers no more than two hydrants shall be opened at one time, and not more than once in each week."

SECTION IV. "Water shall be furnished free of charge, to the public schools, and all other public buildings, used exclusively for city purposes, and for filling public cisterns, and the city hospital shall also be supplied with water free, by a supply pipe, whenever the mains shall be laid within seven hundred and fifty (750) feet of said hospital, and water shall also be supplied free, for six (6) drinking fountains, with openings for man and beast, and one (1) public fountain, to be erected by the said Samuel R. Bullock & Company, in such places on the line of mains, as the Board of Mayor and Aldermen of the City of Vicksburg may direct."

SECTION V. "The said Samuel R. Bullock & Company, their associates, successors or assigns, may procure the organization of a water works corporation under the laws of any State, and may assign to it all the rights and privileges acquired hereunder, provided that such assignment shall not invalidate

or affect the bonds required by Section seven (7) hereof. And no assignment hereof shall be valid unless such assignee shall, in writing to said board of mayor and aldermen, accept this ordinance, and become bound by its terms and obligations. And the said board of mayor and aldermen shall pass and enact such further and other ordinances and do and perform such other acts, including the re-passage of this ordinance, in favor of the said corporation as may be necessary to vest in the said corporation the rights and privileges hereby granted."

SECTION IX. "At the expiration of each period of ten (10) years after this ordinance takes effect the Mayor and Aldermen of the City of Vicksburg shall have the right and privilege to purchase the said system of water works, provided they notify the said Samuel R. Bullock & Company, their associates, successors and assigns of their intention so to do, at least one year before the expiration of the said period of ten (10) years."

"The value of the said system shall be ascertained as follows: The said Samuel R. Bullock & Company, their associates, successors or assigns, and the said Board of Mayor and Aldermen of the City of Vicksburg, shall severally appoint one person, the two appointees shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of water works. None of the board shall be residents of the said Warren County. The said Mayor and Aldermen of the City of Vicksburg shall, within sixty days after the said board have rendered its decision, pay the amount awarded in cash. A failure to so pay the award, or

to give a notice of the intention to purchase as provided, shall operate as a waiver of the right to purchase until the expiration of the next succeeding period of ten (10) years."

SECTION XII. "Be it further ordained that as part of the consideration for the performance of the duties and obligations hereby imposed on said Bullock & Company, their associates, successors and assigns, the said water works and the property and business pertaining thereto, and employed in and about said system, shall be exempt from all municipal taxation during the first five years of their operation, and all of the property and business pertaining to and employed in and about said system of waterworks shall hereafter during each year of the balance of the period of this contract be assessed for taxation by said city at a valuation not to exceed the sum of fifty thousand dollars ($50,000)."

SECTION XIII. "The said Samuel R. Bullock & Company, their associates, successors or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water as they may determine, provided that said rates shall not exceed 50 cents for each 1,000 gallons of water."

This ordinance was passed by the board of Mayor and Aldermen of the City of Vicksburg, Mississippi, and accepted by Bullock & Company, and the works were completed and tested, and the same accepted by the city. Before the works were completed, and while Bullock & Company were the owners of the

contract, they, in 1887, assigned it to the Vicksburg Water Supply Company, and it in turn, as authorized by the laws of the State of Mississippi, executed a deed of trust, conveying all of its property, franchises, contracts, etc., to secure the payment of an issue of its two hundred and fifty thousand dollars ($250,000) bonds, and in default of payment of interest on said bonds, the trustee thereof sold the property, franchises, contracts, etc., on the 8th day of August, 1900, pursuant to the terms of the deed of trust, to appellant, the Vicksburg Water Works Company, a corporation of Mississippi. But appellant did not take possession of the plant until the 15th day of August, 1900.

On the 9th day of March, 1900, the Legislature of Mississippi passed an act, on behalf of the City of Vicksburg, Mississippi, providing for the purchase or construction of water works, and so much thereof as appertains to water works, is in words and figures as follows to-wit: "An act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of three hundred and seventy-five thousand dollars, to purchase or construct, equip and maintain a water works system, construct and establish a sewerage system, to purchase grounds for, erect and equip a city hall, construct the necessary building for a hospital medical college, and for other purposes."

SECTION I. "Be it enacted by the Legislature of the State of Mississippi, that the Mayor and Aldermen of the City of Vicksburg shall have, and they are hereby authorized and empowered to issue, negotiate and sell the bonds of the said city in any sum not to ex-

ceed three hundred and seventy-five thousand dollars par value, bearing interest not to exceed the sum of 5 per cent per annum, payable annually. Said bonds may be issued in such form and amount as said mayor and aldermen may prescribe, and shall be payable at the expiration of forty years from the date of the issuance thereof; provided, always, that the said mayor and aldermen may in their discretion reserve to the said city the right to call in and retire each year, after the expiration of ten years, not less than $5,000.00 of said bonds."

SECTION II. "The proceeds derived from the sale of said bonds shall be applied as follows:

"One hundred and fifty thousand dollars, or so much thereof as may be necessary, for the purchase of the present power plant and system of water works, now owned and operated by the Vicksburg Water Works Company, if the said mayor and aldermen deem such a purchase to be for the best interest of the said city, otherwise they are hereby authorized and empowered to use and apply the said amount, or so much thereof as may be necessary, for the construction, establishment and maintenance of a new and complete system of water works, to be owned, maintained and operated by the said City of Vicksburg.

"One hundred and fifty thousand dollars, or so much thereof as may be necessary, for the construction of a system of sewerage in said city, which said system, when constructed, shall be and thereafter continue the property of the said city. The mayor and aldermen are hereby authorized and empowered to adopt such plans and specifications for

the construction of said water works and sewerage system as to them may seem proper, and may enter into a contract for the construction, or purchase of the same, and make payment therefor in accordance with the provisions of this Act. But said bonds so provided for the construction of a sewerage system shall not be issued nor sold until said mayor and aldermen shall have first provided for the purchase or establishment of a system of water works, as above provided."

"The said mayor and aldermen of said city are hereby authorized and empowered to furnish and sell water to private persons and corporations, and to charge and receive such compensation and toll therefor as the said mayor and aldermen of the said city may, from time to time, fix and establish."

SECTION IV. "It shall be the duty of the Mayor and Aldermen of the City of Vicksburg to levy and collect an annual tax upon all the taxable property in said city, to be known as the 'Water Works and Sewerage Tax,' sufficient to meet the interest on the bonds issued by said city, and to provide also for a sinking fund to pay said bonds as they mature. And all profits derived from the sale of water and connection with sewers shall likewise be placed with said sinking fund for the payment of said bonds. The said tax shall be levied and collected as other taxes are levied and collected in said city, and no part of the same, nor any of the profits derived from the water works or sewerage system, shall ever be used for any other purpose than for the payment of the principal and interest of said bonds."

SECTION VI. "That the Mayor and Aldermen of the City of Vicksburg are hereby granted the right of eminent domain, in accordance with the provisions of law, for the purpose of acquiring any rights, easements, land or property in said city necessary or convenient for it in the establishment, maintenance and operation of the purposes aforesaid, and it may acquire, by purchase, donation or condemnation, suitable grounds for the said purposes, within the corporate limits of said city, as well as the right of way for laying water works mains, or pipes, and sewer pipes, to and from said work, and within the corporate limits of said city. And for the construction and equipment of said water works and sewerage system the said city may acquire, by purchase, donation or condemnation, any suitable grounds within or without said city, the right of way to and from said work, and also the right of way for laying water pipes within the corporate limits of said city, and from said water works to the said city."

SECTION VIII. "Before any bonds shall be issued under authority of this act the said mayor and aldermen shall give twenty (20) days' notice of any election to be held, in the manner provided by law for the election of municipal officers, by publication in some newspaper published and printed in said city, naming the day thereof, and the amount of bonds to be issued, and the purpose or purposes for which they are to be issued, and if a majority of the votes cast at said election be cast in favor of the issuance of said bonds, then the mayor and aldermen of said city shall be fully authorized and empowered to issue, negotiate and sell the same, as above provided."

In accordance with said Act of March 9th, 1900, the board of mayor and aldermen passed a resolution calling an election to be held on the question of bonding the city, as provided in said Act, which resolution is as follows: "Be it resolved, by virtue of the authority vested in the Mayor and Aldermen of the City of Vicksburg, by the Act of the Legislature of Mississippi entitled an Act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of three hundred and seventy-five thousand ($375,000) dollars, to purchase or construct, equip and maintain a water works system, construct and establish a sewerage system, to purchase grounds for, erect and equip a city hall, construct the necessary building for the hospital medical college, and for other purposes. Approved March 9th, 1900.

An election shall be held on the third (3) day of July, on which day the question shall be submitted to the registered and qualified voters of said city, whether the bonds of said city to the amount of three hundred and fifty thousand ($350,000) dollars to purchase or construct, equip and maintain a water works system, construct and establish a sewerage system, to purchase grounds for, erect and equip a city hall; shall be sold and issued for the above named purposes." (See page 47 of Record.)

In accordance with said Act and resolution, an election was held, and the majority of the electoral votes were cast in favor of issuing the bonds to buy or construct water works, but under said Act, resolution and election, the city cannot pay the worth of the property but are compelled to pay an unfair and fixed price made by themselves through the legisla-

ture, although a stipulation *fair* and *just* in all respects is contained in the ordinance of 1886 whereby the city may own its water works. We contend if the city is allowed to construct works of it own, it will be an illegal confiscation of the present works, either by taking it at less than its value, or in compelling appellant to sell in apprehension of the construction of works by the city. Necessarily such construction by the city would result in the total destruction of appellant's property. The operation of the alternative, either to "construct or buy," would be sufficiently effective to destroy the present plant and financially ruin its owners, if allowed to remain in force.

The mayor and aldermen are authorized under Article 28, of the Charter of Vicksburg, to pass ordinances, resolutions, orders, etc., which is as follows: "To pass all ordinances and make all lawful orders necessary to the proper execution of the powers conferred upon them by this Charter." The mayor and aldermen on the 7th day of November, 1900, passed the following resolution, to-wit: "Resolved, That the mayor be and is hereby instructed to notify the Vicksburg Water Works Company, that the mayor and aldermen deny any liability upon any contract for the use of water works hydrants. That from and after August 15th, 1900, they will pay reasonable compensation for the use of said hydrants. That the city attorney take such action as shall be necessary to determine the rights of the city in the premises." (See page 25 of Record.)

After this resolution, and, to-wit, on the 7th day of February, 1901, the water committee of said defendant made the following report, to-wit:

Report of the Committee of Water Works upon the matter of the accounts of the Vicksburg Water Works Company, referred to it.

To the Honorable Board of Mayor and Aldermen:

"GENTLEMEN: Your committee would respectively report, in reference to the above subject, that they have fully considered the question of the accounts presented by said company.

On the 1st day of October (meaning 7th day of November), 1900, the board of mayor and aldermen passed a resolution denying any liability to said company, by virtue of the contract entered into with Samuel R. Bullock and Company, but for the use of hydrants, they would pay a reasonable and just compensation. Our powers, therefore in the premises are limited to a report based upon our idea as to what is reasonable and just. We have deemed it unnecessary, that we should go into any exact estimate as to what is reasonable and just, and therefore have proposed to said company, that we will pay *them from the 15th day of August, up to the day of said resolution at the rate which had been before then paid, and since that time we will pay them at the rate of $50.00 per hydrant* (italics ours), which we consider a most liberal rate. It being *understood, however, that this arrangement should not be deemed conclusive as to what is reasonable and right to pay in the future and after the termination of the pending suit.* (Italics ours.) Neither should this payment be deemed in any way a waiver of the rights of the city in the premises.

(Signed) D. A. CAMPBELL,
T. A. CAUGHLIN,
W. O. SMITH,
Committee."

This report was received and adopted by the City Council on the same day, with these words added thereto, upon the minutes of the board: "That the accounts be allowed on the basis and conditions of the committee's report." (See page 9 of Record.)

Upon these facts, laws and resolutions, the appellee filed a bill of equity in the United States Circuit Court, stating among other things, that these acts, laws and resolutions impaired the obligation of the contract made by the defendant in 1886, and were a cloud upon complainant's title and rights, and asking a decree of the Court annulling these resolutions and laws, and a restraining order enjoining the city from changing the contract price; from constructing a water works plant in disregard of the contract and compelling it to carry out the same as it contracted to do, until further order of the Court. (See page 1 of Record.)

After the bill was filed, and summons served, the defendant filed on the 30th day of April, without leave of Court, three separate pleas (see pages 49, 51 and 52, of Record), one a plea in bar, one a demurrer, which is in substance, a plea in bar, the third a plea in abatement, which was to the jurisdiction of the Court. On filing these pleas defendant gave notice by motion to dissolve the restraining order of injunction granted in this case. One plea denying, and the other inviting and admitting jurisdiction (aside from the fact that none of them set up new matter, and were merely conclusions of law as well as being insufficiently pleaded, particularly as to that plea with reference to the pendency of the suit in the Chancery Court, which fails to give to the Court an ac-

count of the status of the same, as it then existed in the Chancery Court of Warren County.)

Noyles v. Willard, I. Woods, U. S. Circuit Court Report, page 187;

See Forsters Federal Practice, page 144 and the authorities there cited.

The bill of appellant however states that appellant never made any appearance to said suit, except to file a petition to remove the cause to the Federal Court on account of the Federal question involved.

On the 1st day of June, complainant filed a motion to strike these pleas from the file, because they were improperly pleaded. (See page 54 of the Record).

On the 21st day of June, 1901, the defendant without leave of Court, filed an answer including therein two pleas and a demurrer, as originally filed (page 55 of the Record). To which defendant moved to strike the same from the files (See page 70 of the Record), and then complainant moved the Court to require defendant to elect on which plea it would stand. (See page 70 of the Record.)

On the application of the defendant, the Court allowed it to withdraw the three pleas filed on the 30th day of April, also the pleas and answer filed on the 21st day of June, 1901, and permitted it to *refile* the answer, demurrers and pleas filed on the 21st of June, 1901, on the 1st of July, term time. (See page 72 of Record.)

Thereupon complainant moved to strike the answer, demurrer and pleas from the file (page 70 of Record), which was overruled, then complainant moved the Court to require the defendant to elect upon which plea it would stand (page 73 of Record),

which motion the Court overruled. Then the Court took up the matter of jurisdiction.

SPECIFICATION OF ERRORS.

Because the Court erred in dismissing the bill of complainant in this cause, for the want of jurisdiction, on the ground that the statements made by complainant in its bill, do not raise a Federal question.

First. The allegations of the bills raised questions of the power of the State of Mississippi, and of the City of Vicksburg, to impair the obligation of the contract of said complainant with said city, under the Act of the Legislature of Mississippi, approved the 18th day of March, 1886; and the ordinance of the city council adopted November 18th, 1886, and accepted by Samuel R. Bullock and Company for themselves, associates and assigns.

Second. By the enactment of the Act of the Legislature of the State of Mississippi, approved March 9th, 1900.

Third. By the resolution passed by the city council of the said city calling an election upon the question (amongst others) of issuing bonds to purchase or construct water works and the election of July 3rd, 1900, and the vote thereunder, whereby said proposition was carried.

Fourth. By the resolutions adopted by the city council of said city on November 17th, 1900, undertaking to annul the said contract and change the hydrant rentals from sixty-five ($65) dollars to "a reasonable compensation."

Fifth. By the report of the water committee of said city of February 7th, 1901, and the adoption

thereof by resolution, by said city council authorizing the payment of the contract price for hydrants, from August 15th, 1900, to November 7th, 1900, and of fifty ($50) dollars per hydrant from and after the passage of the resolution of November 7th, 1900.

FEDERAL QUESTION.

Independent of the extraneous matters irregularly filed in this cause, there is but one question involved in this appeal for the Court to determine. That question is: Do the bill and amended bill upon their faces raise a Federal question? Are the State Legislative Acts and the Municipal Acts, such laws as impair the obligation of a contract under Article I, Section 10 of the Constitution of the United States? Southern Pacific Railroad Company v. The People of California, 118 U. S. Reports, page 103, says: "The right of removal does not depend upon the *validity* of the claim set up under the Constitution or laws. It is enough if the claim involves a *real and substantial dispute or controversy.*" (Italics ours.) From this decision, it is clear, that whether the obligation of a contract has or has not been impaired is a Federal question, if the *pleading presents a substantial controversy.* And a case may be considered as arising under the laws of the Constitution of the United States, whenever its correct decision depends upon the *construction of either.*

If the above rules of construction be correct to determine a jurisdictional controversy, the Court should have retained the case, and it was especially an error on the part of the Court to try the question on the bill, demurrer and answer, without giving complainant an opportunity to sustain the allega-

tions of the bill by proof? Why should there be any inquiry into the facts of the case to enable the Court to hear the testimony of a controversy that was not ready for trial? To do this, would be to assume certain matters to be true or false that might be to the contrary. The final decree recited (page 73 of the Record), that this cause came on to be heard on motion to dissolve the injunction, etc., upon the *pleadings*, when, according to the certificate of the Court, it would not and did not consider any paper in the case until the question of jurisdiction was determined. Although under the said pleadings other issues were argued by the defendant, and the complainant felt it incumbent on itself to argue the matter, not only on the demurrer, but to argue also that the facts in the answer were untrue. It occurs to us that the proper practice to have determined the question would have been for the Court to require the defendant to elect on which plea it would stand, or to plead in the order that such pleadings should be filed, and considered by the Court. If the Court considered first the demurrer to its jurisdiction, which it should have done, then the final decree should have recited that the case came on for hearing on the demurrer to the jurisdiction of the Court, etc. Necessarily, if the Court was without jurisdiction, that of itself dissolved the injunction. To set down the cause for hearing upon a plea in abatement, a plea in bar and a full answer, and then for the Court to consider all of them at one time, and without an opportunity for replication of facts, violates the fundamental rules of procedure. After a careful research, we are at a loss to find any Federal practice, approving such pleadings and practice; in

fact the pleadings are directly in conflict with rule 39, of the Equity Practice of this Court; wherein it says, defendant may plead to part, demur to part and answer to the residue, *provided the pleas are not in abatement.* Must complainant reply or except to the answer for insufficiency, before, under the rules appellant could have notice that the answer is on file or in existence, for the reason that the plea in abatement is then pending? The decree shows clearly that the Court in determining the Federal question, reached its decision as much from the answer as from the demurrer. In fact the certificate of the Court (see page 75 of Record), says: "The only question which I considered, and decided in dismissing this suit, and the bills of complainant, is whether a Federal question was involved upon the *pleadings.*" (*Italics* ours.)

When appellant presented the citation of appeal for the judge to sign, a portion of which were the following words: "The only question which I considered and decided in dismissing this suit, and the bills of complainant is whether a Federal question was involved upon the *allegations of said bills of complainant.*"

The judge stated that those were not the facts upon which he decided, and remarked: "That upon the face of the allegations in the bills there is a Federal question involved in my opinion, but I decided upon the pleadings in the case, which were the bills and answer;" and thereupon had the citation amended by striking out the following words: "Allegations of said bills of complainant," and added the word: "*pleadings.*"

The record before the Court does not show these changes in the original citation, and should the Court desire it we would be pleased to have the Court have the clerk send the original citation up.

We contend the judge was clearly wrong in taking into consideration any part of defendant's answer, and should not have considered anything but the demurrer to the jurisdiction of the Court, as to whether or not there was a Federal question involved. And we further contend if the judge was of the opinion there was a Federal question raised upon the face of the allegations of the bills, he should have held the case and gone to proof as to the truth or falsity of the allegations. The defendant's demurrer, however, admits the truthfulness of the allegations, and hence the case should not have been dismissed.

These rulings must be damaging to complainant. The well-settled practice is, the Court must decide the question of jurisdiction from the *face of the bill* and amendment thereto and nothing else. The question is:

1st. *Does the statement made by the complainant present a Federal question, independent of what might be finally determined by the Court from the facts?*

2nd. *Has this contract been impaired by the statements made by the complainant's bills?*

As before stated, in 1886, the Legislature of Mississippi passed an act amending the Charter of Vicksburg, in this language: "To provide for the erection and maintenance of a system of water works, to supply said city with water, and to that end to contract with party or parties who shall build or operate water

works," see Section 5, page 695, of said Act, approved March 18th, 1886. After the passage and upon the authority of this Act, the defendant passed an ordinance in November, 1886, contracting with Samuel R. Bullock & Company, their associates, successors and assigns, by which water was to be supplied, for public use, for thirty (30) years, giving the city an option to purchase said water works at the expiration of each ten years, of the thirty years. (See page 14 of the Record, section 9.) The power to make this contract for the time stipulated, and upon the very act involved in this controversy, has already been adjudicated by the Supreme Court of Mississippi, in the case of John B. Reid *et al.* v. The Mayor and Aldermen of the City of Vicksburg, 78 Mississippi Reports, page —. That case was argued and discussed in part by counsel for the appellee here, Magruder, Bryson and Dabney, who seek now to annul this contract, and yet in the above case an eminent and just Court saw no merit in the contention. As already recited, the city had its charter amended by the Legislature in 1886 to enable it "to contract with party or parties to supply the city with water." The city, in 1886, had the right to obtain the authority from the Legislature to enable itself to build and maintain works of its own; it also at the same time had the right in 1886 to obtain the authority from the Legislature to enable it to contract with "party or parties," which latter authority it did exercise in preference to the other; with this optional power in itself, to build or contract with others, and having exercised that power, and preferred another, other than itself, it cannot now ask for a privilege in 1900, from the

Legislature, which it sold to another in 1886. By all legal and moral law the city is precluded from entering into competition with its own selection and obligation made in 1886. Therefore, the effect of the Act of 1900, in this respect defeats and annuls the Act of 1886, and all contracts made thereunder as between these parties, and thereby impairs the obligations of the contract under the Constitution and laws of the United States.

In addition to this, by Section 9 of the contract, it is expressly provided: "That at the expiration of each period of ten years of the contract, after this ordinance takes effect, the mayor and aldermen shall have the right to purchase the system of water works, provided they notify the said Samuel R. Bullock & Company, their associates, successors and assigns, at least one year before the expiration of the said period of ten years." The value of said system shall be ascertained as follows: "The said Samuel R. Bullock & Company, their associates, successors and assigns, and the board of Mayor and Aldermen of the City of Vicksburg, shall severally appoint one person, the two appointees shall choose a third person, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of said system of water works." Evidently each party understanding the word "exclusive," in the contract, to at *least precludе the city* from constructing water works of its own during the thirty years, or to own or acquire water works of its own, except as herein provided, and evidently this is what brought about the reservation expressed in Section 9, of the contract, that the city might in this way own its own water works, if it desired to own one.

Judge Riner, of the United States Circuit Court, in a very able opinion, delivered in February 1901, in the suit of Grant v. The City of Denver *et al* (which is not yet published in the Federal Reporter) says:

"Is the existing contract with the Denver Water Company a bar to the scheme of issuing bonds for the purpose of enabling the city to construct a system of water works? This question must also, I think, be answered in the affirmative. Under the charter the city council has power to provide the city with water, and the question whether the city should supply itself with water, or contract with a private corporation to do so, was presented in 1890. The city elected not to establish its own works and entered into a contract with the Denver Water Company to supply the city and its inhabitants with water for the period of twenty (20) years, after the 10th day of April, 1890." "This contract was expressly limited to twenty years and did not grant the exclusive privilege to the Denver Water Company, hence the city did not exceed its powers conferred upon it by the charter when it made the contract. *Perhaps the city might grant* (italics ours) the same privilege to another company, but that question is not in the case. The question here is, what effect does this contract have upon the right of the *city, a party to the contract* (italics ours), to erect works of its own and enter into competition with the Denver Water Company, the other party to the contract, during the life of the contract. In other words, while it is true that there is no express stipulation in the contract that it will not do so as was the case in Walla Walla v. Walla Walla Water Company, *was it within the contemplation of the parties at the*

time the contract was made that the city should have the right (italics ours), notwithstanding its contract, to erect works of its own and enter into active competition with the water company, when only one-half of the time for which the contract was to run had expired? Did the minds of the parties to the contract ever meet and assent to such a proposition?"

"In the case of Rockfellow v. Merritt, Judge Sanbern said: "One of the most satisfactory tests to ascertain the true meaning of a contract is made by putting ourselves in the place of the contracting parties when it was made, and then considering in view of all facts and circumstances surrounding them at the time of its execution, what the parties intended by the terms of their agreement." When their intention, he adds, "is thus made clear, it must prevail in the interpretation of the instrument."

Judge Riner further said: "By the terms of the agreement, it was to run for twenty years, with a provision that the city may then purchase the property. The rates to be charged both to the city and to private consumers were fixed by the contract for the entire period of its life. Applying the test just mentioned, and putting ourselves in the place of the contracting parties, I think it must be held that it was understood and intended by the parties that the *city at least* would not construct works and enter into active competition with the water company during the life of the contract, but would carry out the contract in good faith for the full period."

Some language used by the Court in the Walla Walla case we think is especially applicable here. It says: "In establishing a system of water works the company would necessarily incur a large expense in

the construction of the power house and the laying of its pipes through the streets, and as the life of the contract was limited to twenty-five years it would naturally desire to protect itself from competition as far as possible and would have a right to expect that the city at least would not itself enter into such competition. It is not to be supposed that the company would enter upon a large undertaking in view of the possiblility that, *in one of the sudden changes of public opinion, to which all municipalities are more* or less subject (italics ours), the city might resolve to enter the field itself, a field in which it would have undoubtedly become the master and practically extinguished the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract."

Notwithstanding the city was thus precluded from thus competing with complainant, by its contract, and the heavy expenditures, made by the complainant, upon the faith of freedom for thirty years, from the formidable competition of the city, against which no private enterprise could maintain itself, the Legislature of Mississippi, by its Act of March 9th, 1900, expressly authorizes the city to construct and operate its own water works, and the city, proceeding under the authority of this Act, has held an election and has been formally authorized to construct and operate its own water works and to issue bonds therefor. It is unnecessary to contend here that the word "exclusive," or any other part of the contract, would preclude the city from granting another franchise to a third party. The city is not attempting to grant another franchise, nor is any other third person offering to either supply the city or its inhab-

itants with water. This question is, therefore, not in this case, and requires no consideration upon this appeal of the case. It can be asserted in this case as in the Walla Walla case, that the plain intent of the franchise as shown, not only from the use of the word exclusive, but also from the context and from the condition of the contracting parties, was that the city should not compete with the complainant. In this case there is nothing in the constitution or laws of the State of Mississippi disabling the city from entering into an exclusive contract. In the Walla Walla case it was against the laws of that State to grant an exclusive franchise. But as before stated this question is not involved in this case and it is at least a fair intendment to say that the city itself would not compete with the appellant in supplying Vicksburg with water. It follows, therefore, that the act of the Legislature of Mississippi, which authorizes the City of Vicksburg to do this act contrary to the intendment of its then existing contract, impaired the obligation of the contract by purporting to make lawful that which, but for such law, must be conceded to be unlawful. The remedy by injunction being essentially preventative, it is manifest that *complainant is entitled to such relief;* notwithstanding that the *city has not done all it proposes to do.*

The Legislative Act of March 9th, 1900, is unjust and unfair, if in fact, not taking property without just compensation.

In this:

Sections One and Four of said Act of March 9th, 1900, or so much thereof as appertain to this case are as follows:

SECTION I. "Be it enacted by the Legislature of the State of Mississippi, that the Mayor and Aldermen of the City of Vicksburg shall have, and they are hereby authorized and empowered to issue, negotiate and sell the bonds of the said city in any sum not to exceed three hundred and seventy-five thousand dollars par value, bearing interest not to exceed the sum of 5 per cent per annum, payable annually. Said bonds may be issued in such form and amount as said mayor and aldermen may prescribe and shall be payable at the expiration of forty (40) years from the date of the issuance thereof; provided, always, that the said mayor and aldermen may in their discretion reserve to the said city the right to call in and retire each year, after the expiration of ten years, not less than $5,000.00 of said bonds."

SECTION IV. "It shall be the duty of the Mayor and Aldermen of the City of Vicksburg to levy and collect a tax upon all taxable property in said city, to be known as the 'Water Works and Sewerage Tax' sufficient to meet the interest on the bonds issued by said city, and to provide also for a sinking fund to pay said bonds as they mature. The profits derived from the sale of water in connection with sewers, shall be pl ced with said sinking fund for the payment of said bonds. The said tax shall be levied and collected as other taxes are levied and collected in said city, and no part of the same, nor any of the profits derived from the water works or sewerage system shall ever be used for any other purpose than for the payment of the principal and interest of said bonds."

Thus, it will be seen that the city is authorized and empowered to levy and collect taxes on all taxable

property in the city, to pay the interest on its water works bonds, and also to levy and collect a tax for a sinking fund to pay off the said water works bonds.

The appellant's water works is taxable property in the city, and it is now paying a large sum annually to the city for taxes assessed on its plant; therefore, if the city is allowed to build its own plant, there would not only be the direct competition of the city with appellant's plant for the trade and custom of the consumers of water, but also a cloud and a burden upon all taxable property in the city, while the city's plant itself would not be assessed for taxes that it might help defray the expenses of the city as a third or other party other than the city would be. No other or third party other than the city could build a plant and maintain itself. And, further, it is manifestly unjust and unfair to allow the city to place a tax on appellant's plant to *pay the interest* on defendant's water works bonds, and also to place a tax on appellant's plant to *finally pay off* the bonded indebtedness of the *said water works bonds*, together with allowing it to build and operate in direct competition with appellant's plant for the trade of water consumers, and especially so when appellant has interest on its own bonds to pay; and the bonds themselves mature, and will have to be paid at the expiration of the thirty (30) years, when the franchise given by the city expires, to-wit: 1916. How can appellant maintain itself under these conditions? Hence it would be, and is in substance and in fact, indirectly taking away appellant's property without just compensation, for it would be to the utter destruction of appellant's plant to permit the *direct competition* of

the city with the above named *advantages of taxction* in favor of the *city*. The city should, in all fairness, be compelled to comply with its contract with appellant; for there is no charge in either of the resolutions stating that appellant has not complied with its part of the contract. And it has done so. The Court said, in the Walla Walla case, on the point of the city's *building and operating in competition*, which is applicable here: "We think, however, that it sufficiently appears that if the city were allowed to erect and maintain competing water works the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raising the funds for maintaining the work by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it cheapest. The plaintiff, upon the other hand, must carry on its business at a profit or the investment becomes a total loss."

Section one of the ordinance contract of 1886, conveyed to Bullock & Company, their assigns, etc., the rights and easements of all streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, Mississippi, "for the purpose of laying pipes, mains, and other conduits, erecting hydrants and other apparatus for conducting water to the City of Vicksburg, Mississippi."

Section Six of the Legislative Act of March 9th, 1900, is as follows: "That the Mayor and Aldermen of the City of Vicksburg are *hereby granted* the right

of eminent domain in accordance with the provisions of law, for the purpose of acquiring any rights, easements, land or property in said city necessary or convenient for it in the establishment, maintenance and operation of the purposes aforesaid, and it may acquire by purchase, donation or condemnation, suitable grounds for the said purposes within the corporate limits of said city, as well as the right of way for laying water works mains or pipes, and sewer pipes, to and from said work, and within the corporate limits of said city. And for the construction and equipment of said water works and sewerage system, said city may acquire by purchase, donation or condemnation, any suitable grounds within or without said city, the right of way to and from said work, and also the right of way for laying water pipes, within the corporate limits of said city, and from said water works to the said city."

Thus it will be seen that this legislative act granted the right of eminent domain to the city and has thereby taken these rights and easements away from appellant, and *replaced* them in the city, thereby annuling and repealing the ordinance contract of 1886, if said legislative act of 1900 is allowed to remain in force. This legislative act impairs the contract of 1886 under the Constitution and laws of the United States, and is a cloud upon appellant's title and rights. And if it has not taken these rights and easements away by the words "*hereby granted*," it has authorized and empowered the city to acquire by purchase, donation or *condemnation* any rights, easements, land or property, suitable grounds for said purposes, as well as the right of way for laying water works mains, or pipes within or without the

corporate limits of said city. Thus it will be seen that the city has the right, under this act, to *condemn* any of the rights, easements, rights of way and grounds that appellant has for its own works. The city may *condemn* appellant's pumping station or the stand-pipe grounds and all rights of ways and easements on the streets, or so much thereof as would totally disable and destroy appellant's plant, or *condemn* the plant entirely and appropriate it to its own use. This is clearly a law impairing the obligation of a contract, in that it changes the conditions and terms in the ordinance contract made in 1886 with Bullock & Company, so that the city may take appellant's plant without waiting until the end of each ten years as is provided in said contract, and the only way in which the city agreed to acquire said property, rights and easements.

Returning from the discussion of the validity of the contract and its impairment by the Legislature of Mississippi, we have not only a substantial controversy involving the impairment of its obligation in this particular, but there are also positive overt acts committed in the only way by which the city can act, impairing the obligation of the contract. *Do these acts impair?* To determine this question, we find the definition of the word impair in the case of Edwards v. Kersey, 96 United States, page 793, to be: "To make worse," "to diminish in quantity," "value," "excellence," or "strength," or "to lessen in power," "to weaken," "to enfeeble," "to deteriorate."

Comparing defendant's acts with the definition, we consider:

First. The resolution of the 7th of November, 1900, by which the city refused to pay the contract price, and attempts to substitute a *reasonable* price for the use of the hydrants, after August, 1900, which is as follows:

"*Resolved:* That the mayor be and he is hereby instructed to notify the Vicksburg Water Works Company, that the mayor and aldermen deny any liability upon any contract for the use of water works hydrants. *That from and after August 15th, 1900, they will pay a reasonable compensation for the use of said hydrants.*" (Italics ours.)

Without any reserved power in the contract or ordinance or resolution or legislative act, to regulate the rates after they are once fixed by the defendant in the contract, any attempt on its part to reduce the rate or to change, lessen, alter, or modify the contract, is an act impairing the obligation of its contract, just as much so as if the defendant sought to change the duration of the contract from thirty years to a different number of years. In fact, the language of the resolution does also change the time as well as the price, and leaves the right to supply the city with water by the company, at the will of the city. Without a reservation of the right to regulate the time and rates, it cannot be done without changing the contract, and when attempted to be done, as in this case, it brings the case within the United States constitutional inhibition.

See Freeport Water Company v. Freeport, 180 U. S. p. 587;

Los Angeles Water Company v. the City of Los Angeles, 178 U. S. p. 558.

The persistency with which the city has sought to destroy this contract, since the contemplated purchase by the present company of the water works, is apparent and amazing when we read the report of the water committee fixing the hydrant rental at $50.00 and adopted by the defendant which is as follows:

Report of the Committee of Water Works upon the matter of the accounts of the Vicksburg Water Works Company referred to it.

To the Honorable Board of Mayor and Aldermen:

"GENTLEMEN: Your committee would respectfully report in reference to the above subject that they have fully considered the question of the accounts presented by said company. On the 1st day of October (meaning the 7th day of November), 1900, the board of mayor and aldermen passed a resolution denying any liability to said company by virtue of the contract entered into with Samuel R. Bullock & Company, but for the use of hydrants they would pay a reasonable and just compensation. Our powers, therefore, in the premises are limited to a report based upon our idea as to what is reasonable and just. We have deemed it unnecessary that we should go into any exact estimate of what is reasonable and just, and, therefore, have proposed to said company that we will pay them from and after the 15th day of August, up to the day of the passage of said resolution at the rate which had been before then paid, and since that time we will pay them at the rate of $50.00 per hydrant, which we consider a most liberal rate; it being understood, however, that this arrangement should not be deemed conclusive as to what is reasonable and right to pay in the fu-

ture, and after the termination of the pending suit, neither should these payments be deemed in any way a waiver of the rights of the city in the premises."

(Signed) "COMMITTEE."

Said report was adopted *by resolution* by the mayor and aldermen.

It is the great and comforting wisdom of this Court, delivered in its decision in the Walla Walla case, that we find so peculiarly adaptable to this ill-tempered and unconstitutional resolution, when the Court said: "It is not to be supposed that the company would enter upon this large undertaking in view of the possibility that, in one of the *sudden changes* of *public opinion* (italics ours), to which all municipalities are more or less subject, the city might resolve to enter the field," etc., unless there were some binding rights absolutely secured by the contract, for a certain time and price to insure at least a return of the investment. Without giving the company the right to be heard, the city, in its own closed closets, and closed councils, arbitrarily fixed the price for the use of hydrants, and considered $50.00 a most "liberal rate;" not that it is reasonable or unreasonable, but that it is "liberal." In the case of The Capital City Gas Company v. The City of Des Moines, 72 Federal 818, also Indianapolis Gas Company v. The City of Indianapolis, 82 Federal 245, and The Consolidated Water Company v. The City of Santiago, 84 Federal 369, where there was no question about the right to regulate the rates, still the authorities hold that a bill to restrain the enforcement of a city ordinance, fixing the rates to be charged by the water works on the ground that such

rates are so unreasonably low as to amount to the taking of the property of the water company, without just compenastion, presents a Federal question.

The resolution of February 7th, 1901, in conjunction with resolution of November 7th, 1900, reduces the rate from November 7th, 1900, from $65.00, the contract price, to $50.00, and seeks to maintain the lesser price until further changed by the city.

This resolution reduces the liability of the city from $65.00 for hydrants, the contract price to a *quantum valebat*, afterwards fixed by the city at $50.00 per hydrant, and further says: "*It being understood however, that this arrangement should not be deemed conclusive as to what is reasonable and right to pay in the future and after the termination of the pending suit.*" (Italics ours.) In other words if this complainant would unsuspectingly fall into this well-laid trap and accept the contract price up to November 7th, 1900, the date of the first resolution, and $50.00 thereafter, it would be an acquiescence by the company in the demands on the part of the city, to regulate the rates to suit themselves and determine what is reasonable, and that these reasonable rates are variable at the will of the council. In other words, if the city should from time to time fix it at a rate so low that it would amount to the destruction of the company's property absolutely, such rates would be reasonable within the contemplation of this resolution, and such acceptance might have been construed as the abrogation of the contract.

This resolution further provides, "That these payments shall not be a waiver of the rights of the city in the premises." There is and was no provision or stipulation, the Court will notice, in this resolution,

which protects the rights of the company, as well as the city; in other words, it is unfair.

This resolution as above stated, offered payment at the *contract price* from August 15th, 1900; that being the date the present company took charge up to November 7th, 1900, the date of the *first resolution; thereby ratifying, acknowledging* and *conceding* the contract to be in the new company, "The Vicksburg Water Works Company." And this resolution offering to pay the *contract price* up to the date of the first resolution, and only $50.00 thereafter, is conclusive, that the mayor and aldermen, understood and intended that the first resolution of November 7th, 1900, was to annul and make void, the ordinance contract of 1886 with Samuel R. Bullock and Company. Who knows better than themselves, what they intended this resolution to mean and do? And that it was to annul and make void the contract of 1886. See their sworn allegations filed in State Chancery Court (on page 32 of Record), wherein they state under *oath* as follows: "Complainants further show that the said mayor and aldermen at a meeting held on the 5th day of November (meaning the 7th), it was resolved and declared that the said board no longer recognized any liability under said contract to said company, *by reason whereof complainants say that said contract no longer exists.*" (Italics ours.) But when the Federal question is raised by appellant's bill in the Federal Court, the city sees it in a wholly different light and meaning. Here the city in answering, and *also* under *oath*, as to the effect, meaning and intent of said resolution, says: "But respondents say that this action on the part of the mayor and aldermen *did not assume to abrogate or take away*

any of the rights of the said complainant, existing by virtue of the alleged contract, and it *is manifest that no such intention or effect can be imputed to such resolution.*" (Italics ours.) (Page 55 of the Record.)

The reversibility of meaning of this resolution is to be admired, its adaptability of construction and effect under oath is so convenient. The apparent necessity of such an adjustable tool in the mouth of a rhetorical piper, sometimes are plain ways for the Court to see what conflicting meaning *plain words may have in different courts.* In the Chancery Court of Warren County, the resolution has one meaning; then when the bill is filed in the Federal Court alleging that this resolution with other acts raises a Federal question, its purpose is warped into other ways and meanings.

The acquiesence in the validity of this contract for thirteen years, without complaint, finding it in all respects acceptable, and agreeable, and while the company is still performing the contract as it is made and agreed to, yet it should have this unjust and unprovoked war made upon it by the relentless desire of defendant to break up and destroy, which war is maintained through the instrumentality of the passage of the Acts of the Legislature of 1900, page 180, when it is a noticable fact that section two of said Act, provides "that said bonds to provide for the construction of a sewerage system were not to be issued nor sold, until the said mayor and aldermen shall have first provided for the purchase or establishment of a system of water works above provided." When this Act is read in conjunction with the resolution of appellee, the purpose of its passage is at once perceived. The condition to require the

ownership of water works before the bonds could be sold to construct a sewerage system, as a condition precedent, which, when realizing the necessity of sewerage, enables the city to ostensibly manifest a *pro bono publico* purpose in its effort to ruthlessly destroy and repudiate an honest and legal obligation, when the purpose of the Act is to compel the company to sell at the arbitrary and unjust and inadequate price of $150,000. The real purpose of the Act in its legal construction is so contemptible, because it, in a conniving and deceptive way, seeks to do in a *quasi* innocent manner an act more destructive to this contract than if it had been an open and positive repudiation of the same.

There is no disadvantage to the city or its inhabitants in owning a sewerage system independent of the water works, and the Legislature of Mississippi meets in January next, and the city can have the Act amended accordingly, if it so desires.

The Court, in dismissing this suit, gave, as a further reason, as we understand it, from its remarks, "that the city had done nothing, and that the company was anticipating something that the city might or might not do."

With all due deference to the Court, how the application of this reason could apply to the want of jurisdiction and be a cause for a dismissal, we fail to comprehend after considerable reflection. The only application we can give it is that the Court, in dismissing the suit, did so because the Court thought appellant had failed to plead sufficiently acts committed (as distinguished from threatened) on the part of the city to warrant the issuance of an injunction, but certainly if this is the meaning of the

Court's remarks and decree, it could not decide whether the injunction was improvidently granted until the Court decided the question of jurisdiction, and if it had decided that it was improvidently granted because the acts complained of had not been consummated or committed, the Court must have intended that it has jurisdiction, because how could the Court consider the propriety of dissolving an injunction without first determining the question of jurisdiction?

But if the lower court was of the opinion no acts had been committed by defendant to warrant an injunction, the Walla Walla case decides that point clearly, for the facts on *these points are the same.* The Court says: "The objections that a Court of Equity has no jurisdiction because the plaintiff has a complete and adequate remedy at law is equally untenable. Obviously it has no present remedy at law, since the city has done nothing in violation of its covenant not to erect competing water works, and the water company has as yet suffered no damage. It is true that after the city shall have gone to the great expense of erecting a plant of its own and of entering into competition with the plaintiff's company, the latter would doubtless have a remedy at law for breach of the covenant. In the mean time, great, perhaps irreparable damages would have been done to the plaintiff. What the measure of such damages was would be exceedingly difficult of ascertaining, and would depend largely upon the question whether the value of plaintiff's plant was destroyed or merely impaired. It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent

upon whether the competition of the city should ultimately destroy, or only interfere with, the business of the plaintiff. This Court has repeatedly declared in affirmance of a general accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity," and cases there cited.

The decisions of this Court upon this jurisdictional question are so complete and numerous that we feel that it is unnecessary to recite any reference at all. After a careful review of them there can be no better authorities than Murray v. Charleston, 96 U. S. Rep., p. 432; Los Angeles Water Company v. The City of Los Angeles, 178 U. S., 558; New Orleans Waterworks Company v. Rivers, 115 U. S., p. 674, and especially the Walla Walla case, 172 U. S., p. 10. Here Justice Brown says in delivering the opinion: "These allegations upon their face raise a Federal question of the power of the city to impair the obligation of its contract with the plaintiff by the adoption of the ordinance." The Court further says: "We know of no case in which it has been held that an ordinance alleged to impair a prior contract with a gas or water company did not create a case under the Constitution and laws of the United States. Granting that, in respect to the two classes of cases above mentioned, responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not been called to an authority where the application of the constitutional provisions as to the impairment of contracts has been made to turn upon the ques-

tion whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such contract was conferred by the charter. We do not say that this question might not become a serious one; that, with respect to a particular contract, the municipality might not stand in the character of a private corporation; but the cases wherein the charter of a gas or water company has been treated as falling within the constitutional provisions are altogether too numerous to be now questioned, or even to justify citation," and the cases there cited. Also see

Illinois Central Railroad Company v. Adams, 180 U. S., p. 28;

City Railway Company v. The Citizens' Street Railroad Company, 166 U. S., p. 557.

Counsel for the city in the court below argued to the court that these various resolutions and laws passed by and at the instance of the city, were nothing more than mere denial of liability, such as was considered in the case of St. Paul Gas and Light Company v. The City of St. Paul, reported in the May number of the advance sheets of the Supreme Court Reports. As we understand that case, it decided in substance that merely because one should deny liability under a contract, this would not of itself raise a Federal question. The distinction made by the Court and the soundness of the same, is at once very apparent, because a simple denial of itself is not an effort to impair, and unless such denial by its terms, and so intended by its creators, is an impairment of the contract, there can be no Federal question. Even a casual reading of the resolu-

tions of November 7th, 1900, and February 7th, 1901, and the Legislative Act of 1900 now before the Court, shows that it is very different from the resolution in the St. Paul case. In that case there was simply a denial of liability and nothing more. But in this case it is not merely a denial of liability, but the city is by this resolution reducing the price that was agreed upon, by saying it will *continue* to pay a reasonable rental, and resolution of February 7th, 1901, saying we will only pay $50.00 for the use of the hydrants, but does not allude to the water it is receiving for schools, hospitals, public fountains and flushing gutters of the city, free of charge, which is a part of the consideration of the contract. (Said resolution does not annul this part of the contract.)

If the city in this case now before this Court, had simply denied liability under the resolution, and did no more and then left the company to sue for its pay, necessarily there could have been no Federal question and the company would have been compelled to sue in the local courts.

The contract provides that for thirty years, the city should pay for one hundred (100) hydrants, at $65.00 per year for each, the resolution of February 7th, 1901, attempts to liquidate the indebtedness of the city for these hydrants, from November 7th, 1900, to February 7th, 1901, at the rate of $50.00 per hydrant, and to keep this lower price in effect only at the will of the city, though the works were built upon the faith of the obligation of the city to pay the higher price for thirty years. It is obvious upon reading the resolutions of November 7th, 1900, that the legislative body of the city, in adopting the same, was not merely denying liability; it was not merely

declaring the contract at an end; it is as apparent as though a preamble to that effect were inserted that the gist of the resolution is not the *use* or abandonment of the use of the water, *but it is the matter of paying for it.*

The effect of the resolution is in no respect different from a resolution which in express terms, and under the title of a resolution to reduce hydrant rentals would provide that the rate to be charged by the company, be reduced from $65.00 to the present "reasonable" value, to-wit: $50.00, without regard to the prior years of loss to the water works plant and to the capital sunk in it.

For the sake of argument let us suppose that the city council had passed the resolution of November 7th, 1900, and *left out* the concluding remarks, "that from and after August 15th, 1900, they will pay a reasonable compensation for the use of said hydrants." Then we think this resolution would, *by itself*, come under the holding of this Court in the St. Paul case. But can the city or its attorneys contend for a moment that in the same breath of denial (as claimed by them) *in toto*, it can reduce the contract price to a "*reasonable*" one? But why dissect this resolution to get at its meaning and intent when we have the sacred oath of its creators stating in plain and unmistakable language that "*by reason whereof said contract no longer exists*" clearly showing appellee understood and meant *by reason* of the *passage* of the resolution that the contract no longer exists. And the city would have insisted upon this position in the State court if the *Federal* question had not been raised.

And we wish to call attention here to the fact that the said resolution and the allegation (by reason whereof said contract no longer exists), was drawn up by the same person, L. W. Magruder, Esq., and who is now contending before this Court that said resolution of November 7th "does not assume to abrogate or *take away any of the rights of complainant by virtue of said contract, and it is manifest that no such intention or effect can be imputed to such resolution.*" (See answer page 56 of Record.) We merely mention this fact to show there was but one controlling mind with respect to the *resolution* and the *allegations* in the State court suit. In other words, to show the city fully understood what the resolutions meant and intended to do.

What would be the attitude if this Court should send the case back to the State court by reason of dismissing this case, and appellant forced to trial on the sworn allegations in said State court? Could not the learned counsel take the position in the State court, and with propriety, that the contract no longer existed after the passage of the resolution of November 7th, 1900? And would not the appellant in answering be forced to take the *reverse* position and allege "*by reason whereof*" the resolution *did not repeal* and make void the contract of 1886, and that it was *merely a denial?*

But suppose further, for the sake of argument, that the resolution of November 7th, 1900, *had never been passed at all*, can the city or its attorney contend in the face of the resolution passed on February 7th, 1901, when it considered the water works account for hydrant rental, that it is not an impairment of the contract of 1886, when the resolution says, we *will*

pay the contract price up to a certain time, but from and after that time the city will only pay $50.00 per hydrant. Does not this resolution change the price from $65.00, the contract price, to $50.00? And does it not go further and say this $50.00 payment was not to be binding on the city for future payments? Meaning by this that the city could *change* the *price again* at its pleasure; and it is but fair and reasonable to presume from the city's past acts, the price would be downward and not upward.

The final supposition. Suppose the resolution of November 7th, 1900, and the one of February 7th, 1901, or either of them had not been passed, would not this case come clearly within the holding of this Court in the St. Paul case, wherein Justice White, in his concluding remarks, when referring to the citation of authorities, made by attorneys for the Gas Co., to support the point of *mere denial*, says: "We do not stop to refer to all these cases thus relied upon, because we think it results from the statement of the proposition that it is without foundation. However, we briefly advert to a few of these cases, *to show how inapposite they are to the proposition which they are cited to maintain.*" (Italics ours.) And one of the cases referred to by Justice White, to show how *inapposite* these cases were, was the Walla Walla case. There stating, *the point in that case was:* "Effect had been given to a municipal ordinance which provided for the construction by the city of a new water works plant, which was to become a competitor with the contracting company." Is not this appellant's case? Has not the city had passed a *special Act* of the Legislature of Mississippi, authorizing the city to build its own plant in

competition with appellant? Has not the city passed a resolution calling an election for the citizens to vote on the question? And has not the election been held and carried? And is not the city now fully authorized and empowered to build the new and competing plant without any further legislation or any other acts on its part? Hence this case, even on this point by itself, does seem to be clearly within the holding of not only the Walla Walla case, but clearly within the import and meaning of the St. Paul case.

We note the State Court had given effect to the ordinance in the Walla Walla case, but we contend that where there is *concurrent jurisdiction*, such State court's decision to give effect is not necessary if the acts are in themselves and upon their face, as in this case, sufficient to raise a Federal question, to give the Federal Court *original* jurisdiction.

But we contend the Legislative Act of March 9th, 1900, and resolution and election thereunder; the resolution of November 7th, 1900, and the resolution of February 7th, 1901, are collectively and separately such laws, acts and resolutions as impair the contract of 1886, and presents a Federal question upon the face of the declarations of appellant's bill. And we feel assured the Court of this law-abiding country will not allow a party or city to trifle with and repudiate its sacred obligations in this wise.

It being sufficient under the decision of this Court to show merely that there exists a fair and substantial controversy as to a Federal question, we ought perhaps to have limited the scope of this brief to that point. The more so, as it is well settled that if there is a substantial controversy, it is the duty of the lower court to proceed to hear and determine

the cause, and to grant relief to which complainant may be entitled upon the principles of equity, even though the Court should before or at the end of the hearing conclude that there was no impairment of a contract. But the question of the existence of a substantial controversy so naturally leads up to the establishment of our contention that the contract has been *impaired* as to make a general discussion of it pertinent here.

We regret exceedingly that our client is impelled by the mandate of the law to prosecute this appeal, for at that time and now we honestly feel that our position is correct. With only about two days real court work, and the rush that is incident to the disposition of cases in trial courts, we cannot believe that our learned District Judge could have given this cause that due consideration as to have enabled him to enter into the spirit of the distinction made by this Court in determining its jurisdiction in such cases.

JAMES A. CARR,
S. S. HUDSON and
A. N. EDWARDS,
Attorneys for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1901.

NO. 392.

THE VICKSBURG WATER WORKS COMPANY,
APPELLANT,

Vs.

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG.

SUPPLEMENTAL AND REPLY BRIEF FOR APPELLANT.

EXCLUSIVE RIGHT.

1st. Appellant admits, as stated in their original brief, that the Act of the Legislature authorizing the Board of Mayor and Aldermen to contract to build and operate water-works, did not authorize said Board to grant an exclusive privilege. But we do contend that where there is no law against such an act, the City could bind itself legally not to build water works in competition with the contracting party during the life of the contract, and that this exclusive privilege is binding as to the City if not as to others.

See Belleven Water Co., vs. Belleven, 35 Pac. Rep., 693.

Suppose, for the sake of argument, that the Appellee exceeded its authority in excluding EVERY ONE ELSE from building water works during the life of the contract, and that Appellant concedes that other parties other than the City itself might build works in competition; however, we contend that THE CITY ITSELF, WHO IS A PARTY TO THE CONTRACT, CANNOT RAISE THIS QUESTION FOR THE PURPOSE OF TAKING ADVANTAGE OF ITS OWN WRONG, if it found that it exceeded its authority. Hence we think the exclusive privilege granted, is good as to the City. The well recognized principle of the law that although a PART of a contract may be void does not vitiate the whole contract, is applicable in this case, if it be found that appellee exceeded its authority in EXCLUDING ALL OTHER parties from building and operating water works. Suppose that any other party together with the City had been a party to the contract and had given appellant an exclusive contract, if there was no law against it, WOULD NOT THAT HAVE BEEN GOOD AS AGAINST ALL WHO WERE PARTIES TO THE CONTRACT? And as no other party who is not a party to the contract is applying, or attempting to build in this instance, we cannot see, as just stated, how this question can be raised by Appellee. Certainly in Equity and justice it cannot be raised successfully by the Appellee. For, as before stated, the well settled principle of law that although a part of a contract may be void, still this does not annul or defeat that part of the contract which may be good, and will be held sufficient and binding, and should be held applicable to the Appellee in this case.

As to the other parts of the contract (outside of the exclusive feature) Counsel for Appellee does not even argue that they are not good and binding, and in so many words says: "The Ordinance granting to Appellant the exclusive privilege to maintain and operate a system of water works was to that EXTENT illegal and void." * * * "It may be that the City would be compelled to pay the annual price for

the hydrants." * * * "If the City had entered into a contract by which it will be bound to pay for the use of hydrants that would not deprive it of the power and right to put in its own works for the use of its sewers and even for its fire hydrants, PROVIDED they should continue to pay the STIPULATED rental for use of the hydrants."

If this be true, does not the Resolution of November 7th, 1900 and especially of February 7th, 1901, where they set out in detail that Appellee will pay the contract price heretofore paid, up to November 7th, 1900, but from and after that time WILL ONLY PAY $50.00 per hydrant, we submit, that these facts clearly impair the obligation of the parts of the contract CONCEDED by Appellee to be good and binding and brings it within the meaning of Article 1, Sec. 10 of the Constitution of the United States, when the price named in said resolution is $15.00 per hydrant LESS THAN THE CONTRACT PRICE? Counsel for Appellee further says: "The sole question before the Court as to the impairment of the obligation of Appellant's contract, is whether the power of the City to build its own works is such an impairment." This is not the SOLE question before the Court. It is one of the questions, (if it be found Appellee can legally raise this question), but there are two others of equal importance, to-wit: The Resolution of November 7th, 1900, and of February 7th, 1901, wherein they reduce the contract price of $65.00 per hydrant to $50.00.

It is very noticeable how lightly Counsel for Appellee "handled" these resolutions in their brief, and especially the one of February 7th, 1901. In our judgment there can be no question but what they impair the obligations of the contract.

As to the "well laid trap," and the quotation made by Appellee's counsel, "'Tis a fanciful fright of a diseased imagination, conjuring devils from the vasty deep of suspicion." We wish to state a few plain facts on this point. On Feb'y 7, 1901, the Appellee passed the resolution stating it would not pay

but $50.00 per hydrant after the date of the resolution of Nov. 7, 1900. A few days after the passage of the latter resolution, Feb'y 7, 1901, M. O. Crumpler, the Manager and Treasurer of the Water Company, made the following statement in the "Evening Post" of this city referred to in the Mayor's communication. See Record, p. 68.

"There appeared an article in our paper yesterday to the effect that it was reported that Mr. Crumpler stated that he would cut off public hydrants, after reasonable notice was given to the city and underwriters, if the city did not pay the Company's bill for the six months due on the 1st of January. Mr. Crumpler authorizes us to say that what he stated was substantially as follows: 'The city's proposition to pay the Company was only a partial payment and that it was so worded and hedged about that if accepted by the Company it would make the Company commit an act that would be a false position with reference to the contract with the city, and might be construed the breaking of the contract, and for those reasons the Company could not accept under the conditions offered by the city, and that if the city continued to refuse to pay except under those conditions it would soon put the Company in a position that it could not furnish water any longer for fire protection, and that it did not want to do this but would be forced to do so.'"

MAYOR'S COMMUNICATION.

"Mr. M. O. Crumpler, Supt. of the Vicksburg Water Works Co.

Dear Sir:–I notice in the Evening Post what purports to be a statement from you to the effect, that the offer of the city to pay you $50.00 each for the use of the fire hydrants, was made upon such condition as you could not accept. It is my understanding, and I am so advised also by the the City Attorney, that it was not the intention of the Mayor and Aldermen to impose any condition by which your rights, in the controversy with the city should be in any way affected. I am therefore prepared to take your receipt for said payments

stipulating that your rights in the premises shall not be impaired or waived by accepting payment as aforesaid.

Very Respectfully.

(SIGNED) W. L. TROWBRIDGE, Mayor.

Appellee in its answer, and counsel in its brief call attention to this communication from the mayor as showing a spirit of fairness. Hence the "well laid trap" mentioned by Appellants is characterized as, ''Tis a fanciful fright of a diseased imagination, conjuring devils from the vasty deep of suspicions etc." BUT WHEN WE REFER TO THE RECORD IN THIS CASE and find the restraining order was granted on Feb'y 14, 1901, (Record page 12) we think our suspicions of the "well laid trap" were pretty well founded.

We call attention to the fact that this communication called "fairness" is copied in full on page 68 of the Record, EXCEPT THE DATE OF THE DAY, MONTH AND YEAR, WHICH IN COPYING IT WAS LEFT OFF ENTIRELY; Why is this? This document is in possession of the Water Co., and bears date of Feb'y 15, 1901, and received by it on that date by Special Messenger. The spirit of fairness arose one day after the restraining order was granted.

Appellee's brief, p. 29, states that "while the Record shows this letter to be dated Feb'y 14, we are informed that the Company did not receive it until the 15." It is a fact that the Record, page 68, shows no date at all, not even the month nor year.

"Little things show quickest which way the wind blows."

Respectfully Submitted,

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Att'ys for Appellants.